APPENDIX A

These consolidated proceedings, including Nos. 60, *et al.*, arising out of the Tenth Circuit, and Nos. 111, *et al.*, arising out of the District of Columbia Circuit, involve two major court decisions relating to three issues. They involve review of four opinions of the Federal Power Commission. To assist the Court in understanding the relationship between the several cases, we have set forth below a brief resume of their procedural background:

Nos. 60, 61, and 62 relate to the opinion of the Court of Appeals for the Tenth Circuit issued December 9, 1966, in *Sunray DX Oil Company* v. *F.P.C.*, 370 F.2d 181 (10th Cir. 1966), in which the court upheld the Commission's decision in consolidated producer certificate proceedings [Re *Amerada Petroleum Corp., et al.*, Opinion No. 422, 31 FPC 623 (1964)] so far as that decision determined an in-line price for producer sales in Texas Railroad District No. 4. However, the court reversed the Commission on a different ground, holding that the Commission has no power to order producers to make refunds of amounts collected pursuant to unconditioned temporary certificates. Immediately prior to issuance of the lower court's opinion on review of the Commission's *Amerada* Opinion No. 422, the Commission, on December 6, 1966, issued its *Amerada* Opinion No. 501-A in the same proceedings which was devoted entirely to the refund issue. In Opinion No. 501 the Commission held both that it has the power to order refunds in these circumstances and, further, that, based upon equitable considerations, refunds should be made. Upon the filing of petitions for review of *Amerada* Opinion No. 501, the court held by *per curiam* opinion issued March 27, 1967, that its earlier decision on review of Opinion No. 422 controlled. Accordingly, it reaffirmed its conclusion that the Commission lacks the power to order refunds of amounts collected pursuant to unconditioned temporary certificates (II R. 6759-6765). Having decided the refund

issue on the basis of the lack of Commission power, the court expressly did not pass upon the question whether, if Commission power were assumed, the Commission had properly decided the equitable considerations (II R. 6890). Petitions for certiorari in Nos. 80 and 97 relate to the lower court's review of the *Amerada* Opinion No. 501.[1]

Case Nos. 111, 143, 144, and 231, relate to a single opinion of the Court of Appeals for the District of Columbia Circuit issued February 7, 1967, in *Public Service Commission of the State of New York* v. *F.P.C.*, 373 F.2d 816 (D.C. Cir. 1967), in which that court reversed the Commission's decisions in two consolidated producer certificate proceedings [Re *Hawkins & Hawkins*, Opinion No. 475, 34 FPC 897 (1965) and Re *Sinclair Oil & Gas Co.*, Opinion No. 476, 34 FPC 930 (1965)]. The court reversed in-line price determinations for producer sales in Texas Railroad Districts Nos. 3 and 2, respectively (IV R. 4302-4316). It also reversed the Commission's holding that questions of pipeline and public need for the gas should more appropriately be determined in pipeline certificate proceedings (IV R. 4293-4301).

The producers, Shell Oil Company (No. 111), and Skelly Oil Company, *et al.* (No. 143) intervened in the D.C. Circuit Court proceedings in support of the Commission's determinations. These producers petitioned the Court for certiorari to the Court of Appeals for the District of Columbia Circuit decision reversing and remanding Commission opinions in *Hawkins* and *Sinclair*.

Because of the manner in which these cases have arisen, producers are respondents in the Tenth Circuit cases (Nos. 60, 61, 62, 80, and 97) and petitioners in the District of

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[1] Review of Opinions Nos. 422 and 501 was sought by a number of producers, the first producer in point of time being *Sunray DX Oil Company*. Accordingly, the proceedings in the Tenth Circuit are sometimes referred to as the *Sunray* case.

Columbia Circuit cases (Nos. 111, 143, 231). However, only one producer is involved in both the Tenth Circuit and the District of Columbia Circuit cases. The producers, except The Superior Oil Company, support the Commission's in-line price determinations in all cases and its decision on the need issue in *Hawkins* and *Sinclair*. They support the decision of the Court of Appeals for the Tenth Circuit on the in-line issue and the retroactive refund issue. Producers are petitioners on the in-line issue from the decision of the District of Columbia Circuit (Nos. 111 and 143). The producer-petitioners in No. 143 also raise the need issue. The producers are respondents in all cases arising out of the Tenth Circuit (Nos. 60, 61, 62, 80, and 97).

Another producer, The Superior Oil Company, sought review of the *Sinclair* Opinion No. 476 on the ground that the in-line price was too low. Superior is also seeking review in this Court of the lower court's decision on the in-line issue (No. 231).

The distributor interests, including the Public Service Commission of the State of New York, filed separate petitions for review of *Amerada* Opinion No. 422, which were consolidated in the Tenth Circuit with producer petitions filed by Sunray DX Oil Company, *et al.* The distributor interests oppose the Commission's price-line determination in *Amerada* Opinion No. 422 which was affirmed by the Court. They support the result reached by the Commission on the retroactive refund issue. Consequently, the distributor interests are petitioners opposing the decision of the Court of Appeals for the Tenth Circuit on the price-line and refund issues (Nos. 61, 62, 97).

The distributor interests sought review of the *Hawkins* Opinion No. 475 and the *Sinclair* Opinion No. 476, raising both the price-line and the need issues. Since the Court of Appeals for the District of Columbia Circuit reversed the Commission on these issues, the distributor interests are

respondents in the cases arising out of that Circuit (Nos. 111, 143, 144 and 231).

The Commission, having been reversed on the retroactive refund issue in the Tenth Circuit, is a petitioner with regard to that issue (Nos. 60 and 80). It is a respondent on the in-line issue in that Circuit (Nos. 61 and 62). On the other hand, since the Commission was reversed on the in-line issue by the Court of Appeals for the District of Columbia Circuit, it is a petitioner here on that issue (No. 144). The Commission's petition does not raise the need issue.

APPENDIX B

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows.

Section 7(c), 15 U.S.C. 717f(c):

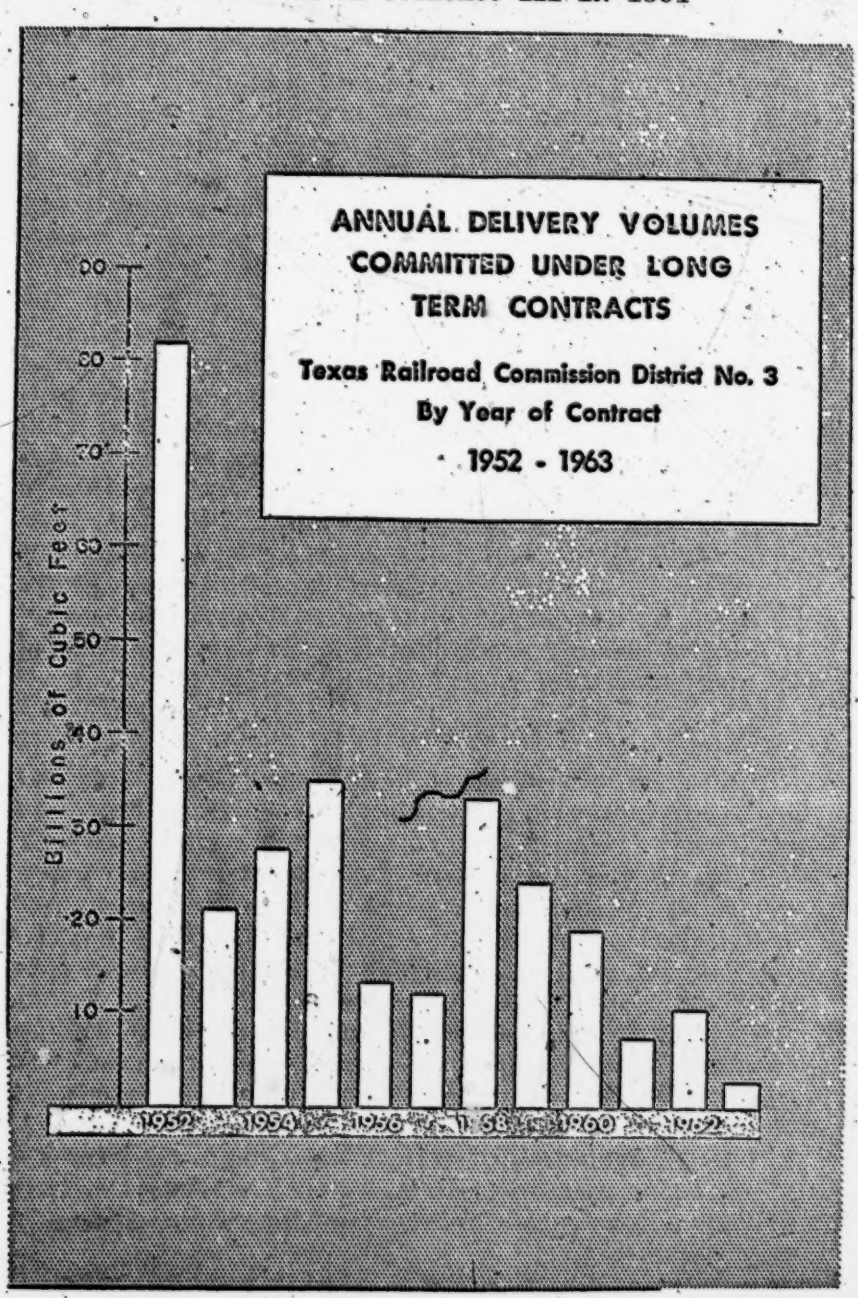
> "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *."

Section 7(e), 15 U.S.C. 717f(e):

> "* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

APPENDIX C

Exhibit 5
Witness Celia Star Gody
III R. 1491
Received in evidence III R. 1364



APPENDIX D

Distribution of Prices Permanently Certificated

(Dated 1-1-58 through 9-27-60)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume
Less than 10.0	3	120,000	4.50
13.5	8	116,100	4.35
14.0	3	60,750	2.28
14.2	1	45,000	1.69
14.4	1	90,000	3.38
14.5	4	132,000	4.95
14.6	2	96,000	3.60
15.0	8	295,075	11.07
15.1	1	60,000	2.25
15.2	3	166,170	6.23
16.0	4	968,000	36.31
16.2	4	514,000	19.28
17.5	1	2,190	0.08
18.0	1	731	0.03
	44	2,666,016	100.00

Distribution of Prices Permanently Certificated

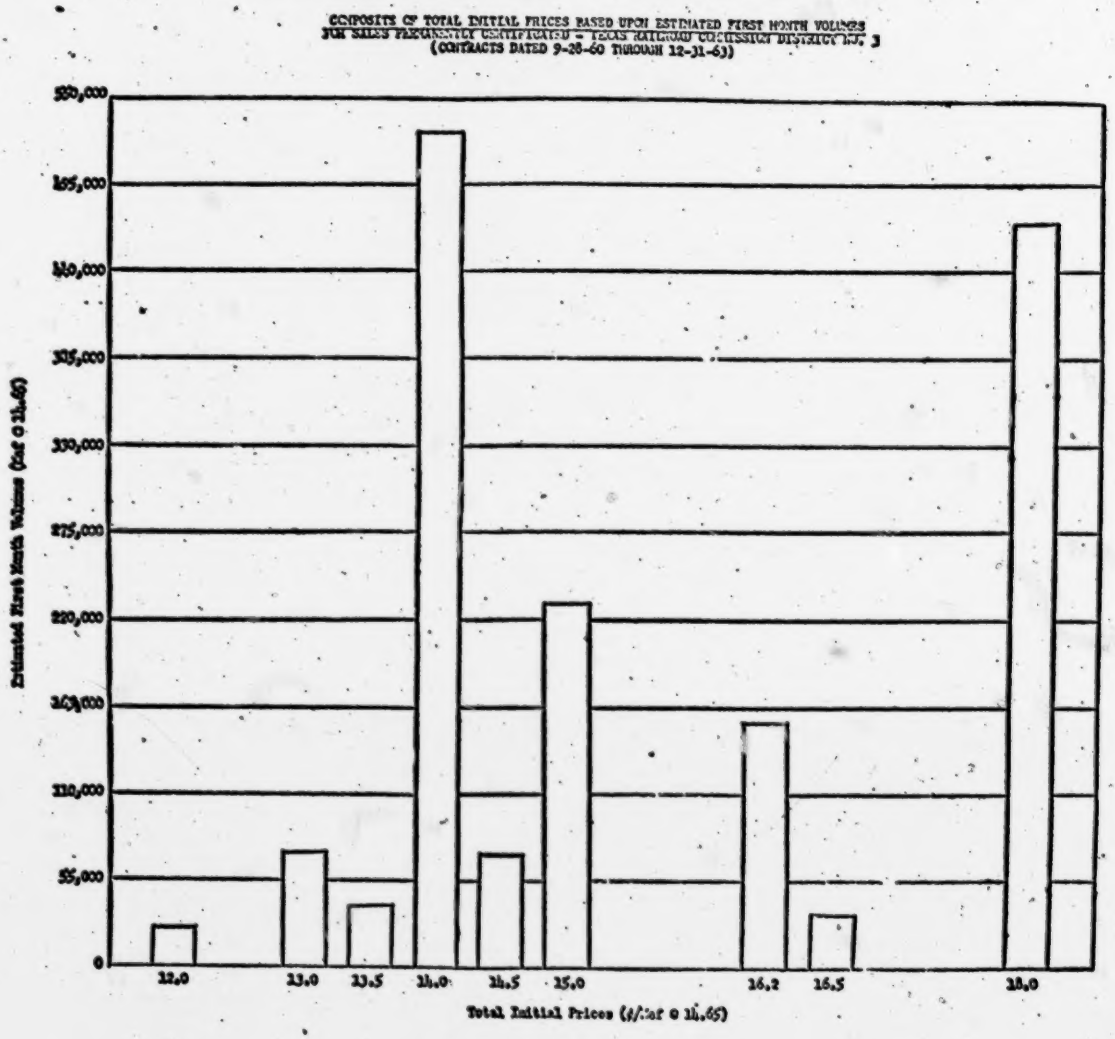
(Dated 9-28-60 through 12-31-63)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume
12.0	2	24,000	2.13
13.0	2	75,000	6.64
13.5	2	33,615	2.98
14.0	2	42,000	3.72
14.5	3	75,000	6.64
15.0	9	213,100	18.88
16.2	3	155,000	13.73
16.5	1	30,000	2.66
18.0	3	481,040	42.62
	27	1,128,755	100.00

APPENDIX E

(Exhibit 2—Staff Witness Russell T. Jones Hawkins Case)

III R. 1453—Received in Evidence III R. 928



Distribution of Prices
Permanently Certificated Sales
(Contracts Dated 9-28-60 Through 12-31-63)

Total Initial Price	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume
12.0	2	24,000	1.47
13.0	2	75,000	4.59
13.5	2	33,615	2.06
14.0	12	531,020	32.51
14.5	3	75,000	4.59
15.0	10	228,600	14.00
16.2	3	155,000	9.49
16.5	1	30,000	1.84
18.0	3	481,040	29.45
Total	38	1,633,275	100.00

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[18 CFR, Parts 154 and 157]

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and and John A. Carver, Jr.

Docket No. R-199

Non-acceptability of Contracts Between Independent Producers and Interstate Natural Gas Companies Containing Certain Provisions in Daily-Contract-Quantity and Take-or-Pay-for Clauses

Order No. 334

Prescribing Certain Make-Up Provisions

(Issued January 18, 1967)

On May 22, 1961, the Commission issued a Notice of Proposed Rulemaking in this proceeding (26 F.R. 4615), as amended on June 20, 1961 (26 F.R. 5689), and as further amended on March 16, 1965 (30 F.R. 3715), wherein it proposed to limit provisions in rate schedules by prohibiting the use of certain daily-contract-quantity and make-up provisions in contracts for the sale for resale of natural gas by independent producers in interstate commerce. This rule was proposed primarily because of the potential economic dangers posed by the prepayment positions of many pipeline companies and the likelihood of higher gas costs for consumers caused thereby, contrary to the public interest.

Comments were invited from interested persons and 42 replies to the amended notice were received.[1] Of these, 32, including the Independent Natural Gas Association of America, representing pipeline companies, and the Independent Petroleum Association of America, representing producers, requested termination of the proceeding without any affirmative action. In addition, a number of pipeline companies, independent producers, the Railroad Commission of the State of Texas and the Kansas Corporation Commission independently filed responses in opposition to the proposal. Ten parties submitted responses suggesting substantial modifications to the proposed rule. Included among them were various distribution companies, independent producers and the Pennsylvania Public Utilities Commission.

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[1] Amerada Petroleum Corporation; Ashland Oil and Refining Company; Associated Gas Distributors; Perry R. Bass; The California Company, a division of California Oil Company; Cities Service Company, Cities Service Oil Company, Columbian Fuel Corporation; Columbia Gas System Companies; Consolidated Gas Supply Corporation; Continental Oil Company; El Paso Natural Gas Company; Forrest Oil Corporation; Gulf Oil Corporation; Humble Oil and Refining Company; Hunt Interests; Independent Natural Gas Association of America; Independent Petroleum Association of America; Kansas Corporation Commission; Kansas-Nebraska Natural Gas Company, Inc.; Kerr-McGee Oil Industries, Inc.; Marathon Oil Company; Natural Gas Pipeline Company of America; Northern Natural Gas Company; Pan American Petroleum Corporation; Panhandle Eastern Pipe Line Company; Pennsylvania Public Utilities Commission; Philadelphia Gas Works Division of The United Gas Improvement Co.; Phillips Petroleum Company; Railroad Commission of Texas; Shell Oil Company; Sinclair Oil and Gas Company; Socony Mobil Oil Company, Inc.; Southern Natural Gas Company; Sun Oil Company; Superior Oil Company; Tennessee Gas Transmission Company; Texaco, Inc.; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Transcontinental Gas Pipeline Corporation; Trunkline Gas Company; Union Oil Company of California; Warren Petroleum Corporation.

The Commission has carefully reviewed the various comments and has considered the prepayment obligations of the pipeline companies as they currently exist. While we maintain concern over the potential harm which could be caused by an undue burden of excess prepayment balances, we are cognizant of the fact that there are but a limited number of pipeline companies who currently have made prepayments to the same degree as that prevalent in earlier years. Most companies have been able to reduce their prepayment burdens. One major contribution to the alleviation of the burden has been our relaxation of the 12-year deliverability requirement for pipeline companies, resulting from a change in Commission policy (see § 2.61 of regulations, 18 CFR 2.61; promulgated by Order No. 279, March 31, 1964, 31 FPC 750, 29 F.R. 4873.)

A general application of the standards herein proposed would not necessarily result in savings to consumers. Responses to the notice of proposed rulemaking demonstrate that while certain of the provisions might be beneficial as to specific pipeline companies, they would not be desirable as to other pipeline companies and the application of the standards might be such as to require investment by producers even in instances where not necessary. We have found that the proposals in this rulemaking proceeding have been complied with in many gas sales contracts and that in other cases the specific pipeline companies purchasing gas either do not require the proposed prepayment provisions for efficient operation of their systems, or have entered into contracts with the producers which contain provisions meetings their specific needs. Accordingly, most of the proposed provisions would serve no valid purpose today. We do recognize, however, that where pipeline companies have made prepayments for gas not taken, a broad approach to insure the ability of the companies to make-up this prepaid gas is necessary. This approach should be consistent with one which does not

result in a substantial unjustified burden to the producer who must make the gas available. We find that a lengthening of the make-up period to a minimum of 5 years will provide relief for those pipeline companies that might otherwise incur substantial prepayment balances on their books and will lessen the risk of future forfeiture and loss of the payments. Since the independent producers already will have received payment for this gas, we do not foresee any substantial harm to them by the imposition of the requirement that contracts entered into after the effective date of this order shall contain make-up provisions permitting the pipeline companies to make-up prepaid gas within a minimum of 5 years from the date the prepayment is made. During the 5-year period before termination of the contract, the make-up period will be shortened consistent with the time remaining under the contract.

In other respects we find that, at this time, it is unnecessary that the remaining portions of our proposed rule become effective and we will terminate the proceeding as to them.

Since the initiation of the proposed rule in 1961, the Commission, in a number of opinions and orders, has conditioned the issuance of numerous producer certificates making them subject to the final outcome of Docket No. R-199. Each of those producer certificates will be subject to the rule which is prescribed herein. Amendments to the rate schedules for each of these producers should be filed within 60 days from the issuance hereof to provide a make-up period of no less than 5 years in the event there are prepayments for gas not taken for those contracts which have provided a make-up period of less than 5 years.

The Commission further finds in view of the foregoing and upon consideration of all relevant matters presented, including the arguments, contentions, suggestions and other views expressed in the comments received, it is necessary

and appropriate in the administration of the Natural Gas Act that the Regulations under the Natural Gas Act be amended as herein provided.

The Commission, acting pursuant to the authority granted by the Natural Gas Act, as amended, particularly sections 4, 5, 7 and 16 thereof (52 Stat. 822, 823, 825, 830; 56 Stat. 83; 15 U.S.C. 717c, 717d, 717f and 717o), *orders:*

(A) Part 154, Subchapter E, Regulations Under the Natural Gas Act, Chapter I, of Title 18 of the Code of Federal Regulations, is amended by adding a new § 154.103 and revising § 154.110 as follows:

"§ 154.103 Limitations on provisions in rate schedules relating to make-up period for taking prepaid-for gas.

Contracts for the transportation or sale of natural gas, subject to the jurisdiction of the Commission, executed after February 1, 1967, will be rejected if they contain provisions precluding buyer from receiving, at no additional charge per Mcf, gas paid for but not taken at any time during a period of at least five years immediately following payment for such gas not taken, subject to contract provisions to protect against drainage. If the contract terminates before the end of the minimum five-year make-up period, a shorter make-up period, consistent with the time remaining under the contract, will be permitted.

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§ 154.110 Applicability of §§ 154.92 through 154.103.

Sections 154.92 through 154.103 shall be applicable only to those persons specified in § 154.91 and shall not apply to small producer sales made under small producer certificates issued pursuant to § 157.40 of this chapter."

(B) Part 157 of the said Title 18 is amended by revising *Exhibit B* in § 157.25 to read as follows:

"§ 157.25 Necessary exhibits.

There shall be filed * * * the following exhibits:

* * * * *

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Prvided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24(b); *And provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter. The application will be rejected if any contract, executed after February 1, 1967, submitted in support thereof contains any make-up provisions proscribed by § 154.103 of this chapter."

(Secs. 4, 5, 7, 16, 52 Stat. 822, 56 Stat. 83; 15 U.S.C. 717c, 717d, 717f, and 717o)

(C) In all other respects the proceeding herein is terminated.

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(Seal)

JOSEPH H. GUTRIDE,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(18 CFR 154.103)

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Docket No. R-199

Non-acceptability of Contracts Between Independent Producers and Interstate Natural Gas Companies Containing Certain Provisions in Daily-Contract-Quantity and Take-or-Pay-for Clauses

Order No. 334-A

Clarifying and Modifying Order No. 334

(Issued March 21, 1967)

By order issued January 18, 1967, (37 FPC —, 32 F.R. 865) the Commission amended Part 154, Subchapter E, of its Regulations by adding § 154.103 which prescribed limitations on provisions in rate schedules relating to a make-up period for taking prepaid gas, and amended § 157.25 to provide for the rejection of applications for certificates of public convenience and necessity if a contract, executed after February 1, 1967, submitted in support of an application contained any make-up provisions proscribed by § 154.103. Petitions and Applications for Reconsideration, Rehearing and Clarification and Motions for Stay were filed or joined in by Shell Oil Company, Pan American Petroleum Corp., Humble Oil & Refining Company, Mobil Oil Corp., Sinclair Oil & Gas Company, and Phillips Petroleum Company.[1]

[1] Herein referred to jointly as "producers." These petitions and applications are being considered as motions for reconsideration and clarification because an application for rehearing does not lie on an order prescribing a rule.

The main objections of the producers are: (1) that a make-up period of five years is not required; and (2) to the limitation that the contract provide that the buyer should be permitted to receive "at no additional charge per Mcf" gas paid for but not taken at any time during a period of at least five years immediately following payment for such gas not taken. The producers argue that the burden imposed upon them if the five year make-up period is not changed is too harsh in that it does not take into consideration increases in costs over a period of time, the possibility of increased taxes, changes in Btu of the gas and potentially higher royalty payments which they might have to pay to royalty owners.

We intend by the words "at no additional charge per Mcf" that the pipeline companies should not be required to pay an additional charge in order to obtain the extension of the make-up period to 5 or more years.[2] It would be appropriate for the pipeline purchaser to pay, or receive credit for, the difference between the rate when the make-up gas is taken and the rate at which the prepayment was made, depending upon whether the prepayment rate will be higher or lower than the subsequent rate at the time of make-up. In appropriate circumstance the contracting parties may deem it desirable to make the prepayment price the total price for the gas. Such an alternative is acceptable and we shall so provide. We shall revise § 154.103 as hereinafter provided.

In view of our action herein, we see no need to stay the effectiveness of our order, and, accordingly will deny the requests for stay.

In Order No. 334, we noted that each producer certificate which had been issued, conditionally, subject to the final

[2] Thus, if a contract may otherwise provide for a shorter time than five-year term, it would not be proper to apply a surcharge in order to extend that period to five years.

outcome of Docket No. R-199 would be subject to the rule prescribed therein. We required that each of those producers file amendments to his rate schedules to reflect this rule. Some question appears to have resulted from the wording in that order. To clarify that portion of the order we shall make it clear that each producer whose certificate was conditioned to the final outcome of Docket No. R-199 shall file a contract amendment to his rate schedule to provide for a make-up period of at least five years where, under the contract, the pipeline purchaser is required to pay for the gas whether or not taken, *i.e.*, to make prepayments. No additional charge shall be made to the pipeline purchaser in order to obtain this provision in the gas sales contract. The time for filing such contractual amendment is extended to 30 days from the date of this order.

The Commission orders:

(A) The new § 154.103, prescribed by ordering paragraph (A) of Order No. 334 in this proceeding as an amendment to Part 154, Subchapter E, Regulations Under the Natural Gas Act, Chapter I, Title 18 of the Code of Federal Regulations, is revised to read as follows:

> § 154.103 Limitations on provisions in rate schedules relating to make-up period for taking prepaid gas.
>
> Contracts for the transportation or sale of natural gas, subject to the jurisdiction of the Commission, executed after February 1, 1967, will be rejected if they contain provisions precluding buyer from receiving gas paid for but not taken at any time during a period of at least five years immediately following payment for such gas not taken, subject to contract provisions to protect against drainage. If the contract terminates before the end of the minimum five-year make-up period, a shorter make-up period, consistent with the time remaining under the contract will be permitted. The contract may provide that the prepayment price

is the total price for the gas. In the alternative the contract may provide that where the price being collected under the contract has changed between the date that the gas was paid for but not taken and the date the gas is made-up, the make-up gas will be delivered at the price effective at the time it is delivered. If the price has decreased, the decrement will be set off against payments for other gas delivered under the contract and if the price has increased pursuant to the provisions of section 4 of the Natural Gas Act, any increase provided for the make-up gas should be subject to any rate order issued by the Commission in the appropriate rate action.

(B) This amendment shall be effective January 18, 1967 *i.e.*, the issuance date of Order No. 334.

(C) Within 30 days from the issuance of this order each producer whose certificate of public convenience and necessity was conditioned to the final outcome of Docket No. R-199 shall file a contract amendment to his rate schedule to provide for a make-up period of at least five years where, under the contract, the pipeline purchaser is required to pay for the gas whether or not taken, *i.e.*, to make prepayments. No additional charge shall be made to the pipeline purchaser in order to obtain this provision in the gas sales contract.

(D) The Motions for Stay of Order No. 334 are denied.

(E) To the extent not adopted herein, the Motions for Reconsideration and Clarification are denied.

(F) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.